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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALVERNON YOUNG, JR.,

Defendant and Appellant.
_____/

H028911

(Santa Clara County Superior Court No. CC327627)

Following a jury trial, defendant Alvernon Young, Jr. was convicted of battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d) - count 1)[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1) - count 2). The jury also found that defendant personally inflicted great bodily injury in the commission of count 2 (§§ 1203, subd. (e)(3), 12022.7, subd. (a)). In a bifurcated proceeding, the trial court found that defendant had suffered six prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12) and one prior serious felony conviction (§ 667, subd. (a)). The trial court also found that he had served a prior prison term for

[1] All further statutory references are to the Penal Code unless otherwise stated.

a violent felony (§ 667.5, subd. (a)) and a prior prison term (§ 667.5, subd. (b)). The trial court then sentenced defendant to a total term of 25 years to life plus 11 years.

On appeal, defendant contends: (1) the trial court erred in admitting multiple prior felony convictions for impeachment purposes and to show that he had a propensity for violence; (2) the trial court erred in admitting evidence that he was a parolee; (3) the trial court violated his due process rights in its instructions on the right to act in self-defense; and (4) the trial court violated his due process and jury trial rights by using his prior juvenile adjudications as strikes under the Three Strikes law. For the reasons stated below, we affirm.

I. Statement of Facts

A. Prosecution Case

In September 2003, Stephen Sereno was one of the owners of F &S Auto Body Shop, which had shops in both Santa Clara and Sunnyvale. Sereno worked at the Santa Clara location with two employees, Jorge Gonzalez and Ernesto Velasco. Sereno routinely ordered windshields from Mygrant Glass. The drivers from Mygrant Glass occasionally delivered items that had been ordered by the Sunnyvale shop to the Santa Clara shop.

At about 11:40 a.m. on September 15, 2003, defendant, a delivery driver for Mygrant Glass, arrived at the F & S Auto Body Shop, and asked Sereno if he had ordered a windshield. Sereno said no. Defendant replied, "I'm tired of this fucking shit." Sereno asked to see the invoice, and defendant showed it to him. Sereno pointed out that the invoice was addressed to the Sunnyvale shop, and told defendant that if he had read the invoice, he would have gone to the correct location. Defendant said words to the effect of "Don't be a smart ass," and returned to his truck.

Sereno walked to his own truck, which was parked about five feet from the front of the shop. Defendant's truck was a bit further away. Defendant said something to Sereno, which he did not understand. Sereno then said that he did not

know why defendant was mad at him, because Sereno had not sent defendant to the Santa Clara shop.

Defendant, who was still in his truck, accused Sereno of having made a racist comment to him. Sereno responded that if defendant felt that he had made such a comment, then defendant should call the police. Defendant exited his truck and walked up to Sereno. While defendant was standing within two to three inches of Sereno, he told Sereno to lay hands on him. Sereno said that he was not going to do anything stupid and that he was going to call the police. Sereno then started walking away from defendant and toward his office. After Sereno had taken about three steps, defendant hit him from behind with a closed fist. The blow struck Sereno in the mouth, breaking his bridgework and two teeth, chipping four teeth, and cutting his lip. Sereno was momentarily stunned, spit out blood and broken teeth, walked to his office, and called 911.[2]

Velasco testified that he saw defendant hit Sereno from behind after Sereno turned to walk back to his office. Velasco then assumed a boxing stance so defendant would back away and he would be able to defend himself if defendant attacked him. Sereno testified that Velasco and defendant were swinging and kicking at each other, but he did not see "anything connect." However, Velasco denied swinging or kicking at defendant. According to Velasco, defendant did not hit him.

Gonzalez testified that he had heard defendant arguing with Sereno. When Sereno walked away from defendant, defendant hit him from behind. At that point, Gonzalez removed defendant's keys from the ignition and took them into the shop. After defendant went to his truck and discovered that his keys were missing, he went to the front door of the body shop. Thinking that defendant might be armed, Gonzalez

[2] On cross-examination, Sereno testified that he had retained counsel, but had not filed a lawsuit against either defendant or Mygrant Glass.

threw the keys in front of defendant. Defendant grabbed them, entered his truck, said he would be back, and drove away.

Luis Marquez, defendant's supervisor at Mygrant Glass, testified that when defendant returned to the warehouse, Marquez told him that a customer had complained about him. Defendant briefly told Marquez what had happened and said he was quitting. According to Marquez, defendant was a good employee, punctual, and trustworthy.

Officer Danny Terrones attempted to locate defendant that afternoon. He went to Mygrant Glass and spoke to Marquez, who said that defendant had just left. Marquez gave Officer Terrones a letter, which defendant had given him.[3] Officer Terrones then obtained an address and phone number for defendant. When he went to that location and knocked at the door, there was no response. Officer Terrones then called defendant's phone number and spoke with Daphne Yu. He left his cell phone number with her, and she said that she would have defendant call him. Shortly thereafter, defendant called Officer Terrones and told him that he did not want to discuss the incident.

On October 29, 2003, Yu told Officer Greg Gunsky where he could find defendant. She also gave Officer Gunsky three California driver's licenses and two social security cards. One of the driver's licenses was in the name of Brian Howard, but had a photograph of defendant. One of the social security cards was also in the name of Brian Howard, while another listed the name of Cyril Brian Bright. Later that day, when defendant was taken into custody, he admitted that he knew the police were looking for him.

[3] However, Marquez testified that he could not recall how he obtained the letter.

B. The Defense Case

Defendant testified that he had made several deliveries to the F & S Auto Body Shop between April and September 15, 2003. He had had contact with Sereno on about 10 occasions. Their relationship became tense, because Sereno made racist comments. Defendant first had words with Sereno when he tried to obtain payment for a delivery and Sereno became "huffy and puffy." Sereno also called him an "uppity boy." On other occasions, Sereno would throw the check at him or say things like "Here you go, Sambo." Sereno also called him "nigger," told racist jokes in his presence, and made comments like, "Can you read, boy." When Sereno heard the music playing in defendant's truck, he said it was like "one of those jungle bunny videos." Defendant told his truck supervisor Mark, someone named Cameron, and Marquez about Sereno's conduct, and unsuccessfully asked to be assigned to another route. Defendant also gave Marquez a written complaint about Sereno prior to the present incident.

Defendant testified that on September 15, 2003, he went to the F & S Auto Body Shop in Santa Clara. When he arrived, he entered the shop and asked Sereno if he had ordered a windshield. Sereno replied, "I don't know how you keep a job, we didn't order nothing, you bring the wrong parts and you bring me parts I didn't order." Sereno also said, "It ain't my fault you can't read, boy." Defendant responded, "Quit being a smart ass." Sereno then said something like, "Boy, this is my shop, I can say what I want to say." Defendant and Sereno continued to exchange words. Eventually, Sereno said, "[I]f you think everything I have been saying has been racist, why don't you call the police[?]" Sereno walked toward defendant, came within about a foot and a half of him, and said something like, "I bet you . . . won't deliver this fucking windshield up to our other shop since you have been making racial comments and you messed up." He then told defendant to leave.

Defendant went to his truck and tried to reach Marquez on the radio. Sereno, Gonzalez, and Velasco walked out of the shop. When Sereno asked to see the invoice, defendant handed it to him. Sereno snatched it out of his hand and said, "[R]ight here it says Sunnyvale." Defendant replied that the invoice said Santa Clara. Sereno then called defendant a "nigger," said, "You can't read," and dropped the invoice on the ground. After defendant asked Sereno if he was going to give him the invoice, Sereno said no. Defendant exited his truck and said, "It's fucked up what you did." As defendant bent down to pick up the invoice, Sereno said, "This is what I think about you and your kind," and spit in defendant's face. Sereno then swung at defendant. After Sereno's punch was on its way, defendant launched a punch at Sereno that landed first. It was not a "full blow," but it hit Sereno in the mouth. Sereno's punch then struck defendant in the chest. Defendant only hit Sereno in self-defense. Defendant did not strike Sereno with a "full blow," because defendant was stepping back at the time. However, he acknowledged that he had testified at the preliminary examination that he "got [Sereno] real good."

Gonzalez and Velasco also fought with defendant, punching and kicking him. Defendant hit Gonzalez in the jaw. Gonzalez then removed the keys from defendant's truck and ran into the shop. Defendant followed him and asked for his keys. Gonzalez threw the keys towards defendant, and defendant left.

While driving back to Mygrant Glass, defendant tried unsuccessfully to reach Marquez. He then contacted Cameron, a coworker, and told him what had happened. He also told Mark, his truck supervisor, that there had been an altercation. When defendant saw Marquez, Marquez told him that Sereno had called and reported that a Mygrant Glass driver had knocked out his teeth and he was going to sue Mygrant Glass. Defendant decided to quit his job. He also knew that the police were on the way and he was afraid that he would be in trouble. Marquez told defendant to write a

statement. Yu, defendant's fiancée, arrived to pick him up. While defendant told her what had happened, she wrote the statement. The statement was given to Marquez.

People's Exhibit 7 was the document that Yu wrote. It did not mention that Sereno spit on defendant. Defendant explained that Yu had not included everything that he had told her. After Marquez looked at this note, he asked defendant to write a more detailed statement. Defendant told Marquez that he would write it that night and Yu would bring it to him.

Defendant later wrote a statement and gave it to Yu. She then took it to Mygrant Glass. When the prosecutor presented defendant with People's Exhibit 10, defendant identified it as a letter that had been written by Yu. Defendant explained that Yu thought that his handwriting was sloppy, so she rewrote it and he signed it. He was unsure whether this letter was the one that Yu had delivered. He also stated that Yu had not written everything that he told her to write.

Yu obtained false identification for defendant after the incident. Defendant gave her his driver's license, because he was scared of going to trial and facing the possibility of life in prison. Defendant also admitted that he was on parole. He failed to maintain contact with his parole officer, because he was afraid that his parole would be revoked even if he was not guilty of a crime.

Defendant acknowledged that he had been convicted in 1984 of a violation of section 288a, with an enhancement under section 12022, subdivision (b), in 1989 of voluntary manslaughter and robbery, and in 1991 of an attempted escape from jail. Defendant denied that he had a violent character, but admitted that he had a violent criminal history when he was younger. He also acknowledged that he had been convicted of two counts of forcible oral copulation with a minor, with personal use of a knife, and two counts of kidnapping with personal use of a knife in 1984. After serving time in custody, he committed three robberies in 1989. He was also convicted of five counts of felony false imprisonment and voluntary manslaughter. Defendant

explained that these latter convictions were the result of a plea bargain, following a trial that resulted in a hung jury. With respect to the convictions for forcible oral copulation, defendant only conceded that he was present. He claimed that he committed only one of the robberies, but pleaded guilty to three counts because his attorney advised him to accept a plea bargain.

C. Rebuttal Evidence

The parties stipulated that a subpoena was sent to Mygrant Glass Company, Incorporated, requesting any documents concerning prior complaints involving Sereno. There were no notes, letters, grievances, or any record of any current or former employees complaining about statements or conduct of Sereno prior to the incident on September 15, 2003.

II. Discussion

A. Admissibility of Multiple Prior Convictions

Defendant contends that the trial court erred in admitting evidence of his prior felony convictions. He argues that the introduction of an excessive number of his prior felony convictions for impeachment purposes was more prejudicial than probative and deprived him of his federal constitutional right to due process. He also argues that the trial court improperly allowed the prosecutor to introduce additional felony convictions to show that defendant had a character trait for violence.

1. Factual and Procedural Background

During a hearing on in limine motions, the prosecutor moved to introduce evidence of defendant's prior acts of violence under Evidence Code section 1103[4] to show that defendant did not act in self-defense. The trial court postponed any decision on this issue. However, the trial court stated: "I can preliminarily indicate that absent other argument or authority, it is fairly clear to this Court that should the defendant

[4] All further statutory references are to the Evidence Code unless otherwise stated.

assert a claim that he was not the initial aggressor and that in fact he was responding in self-defense based on the aggressive conduct of the victim, that then clearly the People would be entitled to rebut that by introduction of evidence of the defendant's own violent character." The trial court also noted that there was another possible basis for the admission of this evidence, that is, if defendant introduced evidence of his own character for nonviolence. The trial court then stated that until the self-defense/initial aggressor issue was raised, the motion to exclude evidence of defendant's prior convictions to show defendant's character for violence was granted.

The prosecutor then stated that if defendant's character for violence were to become admissible under section 1103 evidence, he would like to offer proof of specific instances of conduct, that is, felony convictions. These convictions occurred in 1984, 1989, and 1991.[5] The prosecutor argued that defendant was in custody for significant periods of time and suffered felony convictions after 1991, and thus defendant had not engaged in lawful behavior for a sustained period of time.

Defense counsel requested that the prosecutor's motion be combined with the defense motion to exclude any reference to defendant's prior convictions if he were to testify. Defense counsel pointed out that the 1984 case involved a juvenile adjudication and that the 1984 and 1989 proceedings were remote in time. He also argued that the 1991 conviction for escape was not probative of any character trait for violence.

The trial court first stated that it would rule only on the prosecutor's motion to introduce prior convictions for impeachment. Defense counsel argued that this evidence was more prejudicial than probative and should be excluded under section 352. The trial court weighed the likelihood of undue prejudice against the probative

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[5] Though the 1984 juvenile court adjudications were not "convictions" (*People v. Sanchez* (1985) 170 Cal.App.3d 216, 218-219), we will refer to them as such, because that is how they were referred to in the trial court.

value of the prior convictions, and concluded that the prosecutor could impeach defendant with the following: (1) a 1984 conviction of one count of forcible oral copulation; (2) a 1984 conviction of one count of kidnapping; (3) a 1989 conviction of one count of felony false imprisonment; (4) a 1989 conviction of one count of robbery; and (5) a 1991 conviction of one count of attempted escape. The trial court did not allow introduction of any weapons use enhancements for impeachment.

The prosecutor then asked which convictions would be admissible if the foundational requirements of section 1103 were established. The trial court stated that it would allow the following convictions admitted as character evidence under section 1103: (1) a 1984 conviction of one count of forcible oral copulation, with personal use of a knife; (2) a 1984 conviction of one count of kidnapping, with personal use of a knife; (3) a 1989 conviction of one count of felony false imprisonment; (4) the 1989 convictions of three counts of robbery; and (5) a 1989 conviction of one count of voluntary manslaughter.

At trial, defendant testified in his own behalf. On direct examination, he acknowledged that he had incurred the following convictions: (1) a 1984 conviction of one count of "288a" with an enhancement of "12022(b);" (2) a 1989 conviction of voluntary manslaughter; (3) one count of robbery; and (4) a 1991 conviction of attempted escape.

On cross-examination, the prosecutor asked defendant if he had a "violent character." Defendant said no, and stated, "I just get upset, yeah." When the prosecutor asked defendant if he had a violent criminal history, defendant replied, "Yes, when I was younger, yes." The prosecutor then elicited that defendant had the following prior convictions: (1) 1984 convictions of two counts of forcible oral copulation with a minor, with personal use of a knife; (2) 1984 convictions of two counts of kidnapping, with personal use of a knife; (3) 1991 convictions of three

counts of robbery; (4) convictions of five counts of felony false imprisonment; and (5) a conviction of one count of voluntary manslaughter.

2. Legal Analysis

Defendant concedes that the trial court properly found that five of his prior convictions were admissible to impeach his credibility. However, defendant objects to the admission of nine additional prior convictions and four weapon use enhancements on the ground that this evidence was more prejudicial than probative. Defendant also challenges the admissibility of three additional prior convictions and two weapon use enhancements to show his character for violence.

We first note that defense counsel elicited evidence of defendant's conviction for voluntary manslaughter and one weapon use enhancement. Defense counsel also did not object to the admission of the convictions for two counts of robbery, one count of forcible oral copulation, one count of kidnapping, four counts of false imprisonment, and three weapon use enhancements.

The People argue that that none of the objections which defendant raises on appeal was renewed when the prosecutor introduced evidence of defendant's prior convictions at trial. Defense counsel did not object when the prosecutor introduced more prior convictions for impeachment purposes than the trial court had deemed admissible. He also did not object to the admissibility of evidence of defendant's character for violence on the ground that the prosecutor had failed to establish the foundational requirements for such evidence. Thus, the objections were waived. (Evid. Code, § 353.) [6]

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[6] Defendant argues that the admission of these convictions violated his federal due process rights. On appeal, a defendant may argue that an asserted error in overruling a trial court objection on section 352 grounds has the legal consequence of violating his due process rights. (*People v. Partida* (2005) 37 Cal.4th 428, 431.) Here, however, the trial court sustained defendant's objections to the admission of some of these prior convictions and ruled that the other prior convictions were admissible if the

We now consider whether defendant was deprived of the effective assistance of counsel. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215, internal citations omitted.)

The People argue that trial counsel could have had tactical reasons for failing to object. They claim that there were three possible theories to support the admission of defendant's prior convictions. We disagree.

The People first claim that defendant's prior convictions were admissible under section 1103, subdivision (b). This statute provides: "In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence if offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence had been adduced by the defendant under paragraph (1) of subdivision (a)." Thus, the prosecutor may introduce evidence of the defendant's prior conviction after evidence of the victim's character for violence has been admitted. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1083-1084.)

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foundational requirements of section 1103 were met. Thus, the *Partida* holding is inapplicable, and defendant is precluded from challenging the admissibility of this evidence on federal constitutional grounds.

Here defendant presented evidence that Sereno was racist and verbally abusive on prior occasions. However, this evidence did not show that Sereno had a history of physical violence. Nor did defendant's testimony that Sereno spit in his face and swung first during the present incident establish Sereno's character for violence, since it did not involve a prior act of violence. Thus, the evidence of defendant's prior convictions was inadmissible under section 1103.

The People next argue that the evidence of prior convictions was admissible to rebut the evidence that had been adduced by defendant to show his general good character. Section 1102 states: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

In the present case, Marquez testified that he had never received any complaints about defendant's job performance and that he was a good employee. However, section 1102 does not allow rebuttal evidence of a defendant's character in the form of specific instances of conduct. (*People v. Felix* (1999) 70 Cal.App.4th 426, 432.) Accordingly, the evidence of defendant's prior convictions was inadmissible under section 1102.

The People also contend that the evidence was admissible for the purpose of attacking defendant's credibility. (§ 1101, subd. (c).) They rely on the exchange in which the prosecutor asked defendant whether he had a violent character. Defendant first answered, "No," and then, added, "No, I just get upset, yeah." Thus, they argue that defendant's initial denial and subsequent ambiguous response opened the door for impeachment. This argument has no merit. The trial court had already limited the

number of prior convictions for impeachment purposes, and the prosecutor's violation of that ruling did not render the additional convictions admissible.

Since defendant's convictions for one count of forcible oral copulation, one count of kidnapping, one count of voluntary manslaughter, four counts of felony false imprisonment, and two counts of robbery as well as four weapon use enhancements were inadmissible, a reasonably competent counsel would have objected to their admission. We now consider whether defendant has shown any reasonable probability that he would have obtained a more favorable result if the evidence of these prior convictions had been excluded.

Here, as defendant concedes, the trial court properly admitted evidence of five prior convictions, that is, the convictions for forcible oral copulation, kidnapping, false imprisonment, robbery, and escape for impeachment purposes. This evidence seriously undermined defendant's credibility. In our view, the introduction of additional counts of the same type of crimes would have had no significant effect on the jury's determination of defendant's credibility, particularly since the jury was instructed that evidence of defendant's convictions could be used "only for the purpose of determining the believability of that witness." More importantly, the evidence of guilt was overwhelming. The jury's task was to determine whether Sereno or defendant was the more credible witness. Independent of the evidence of defendant's prior convictions, defendant's version of events was seriously undermined by his flight from the scene, his decision to immediately quit his job and leave home, his failure to explain what had occurred to either the police or his parole officer, and his decision to obtain false identification. Defendant also did not produce any evidence to corroborate his testimony that he had told coworkers and Marquez that Sereno had been harassing him on prior occasions. Sereno's testimony was corroborated by that of Velasco and Gonzalez. Sereno also immediately reported the incident to the police.

Based on this record, we conclude that defendant has failed to demonstrate prejudice as a result of trial counsel's incompetent representation.

B. Admissibility of Evidence of Defendant's Parole Status

Defendant next argues that the trial court erred in admitting evidence that he was on parole.

1. Factual and Procedural Background

Prior to trial, the prosecutor sought to admit evidence that defendant was on parole at the time of the current offenses. He argued that this evidence would be admissible if defendant were to testify that he fled the scene because he was scared and frustrated, or that he stayed away from home and went into hiding because his lawyers told him to stay out of reach until they could figure out what to do. The prosecutor further argued that evidence of defendant's parole status would establish that he fled the scene and went into hiding because he was afraid that his parole would be revoked for the assault and he would be returned to prison. Citing section 352, defense counsel objected to the admission of any evidence of his parole status, arguing that it lacked probative value and was highly prejudicial. The trial court ruled: "If the defendant should testify that he left the area, stopped staying at home for -- if the defendant offers an explanation about his flight, I would allow the People to introduce evidence of his parole status and what that would mean to the defendant in terms of arrest and almost immediate incarceration with respect to this incident."

When defendant testified at trial, he stated that he quit his job because the police were on their way and he was afraid that he would be in trouble. He also admitted that he had previously been convicted of forcible oral copulation with a weapon use enhancement, voluntary manslaughter, robbery and attempted escape. On cross-examination, defendant conceded that he obtained fake identification after the incident because he was afraid of being caught and convicted. At this point, the prosecutor requested that he be allowed to introduce evidence of defendant's parole

status to impeach his testimony that he acted in lawful self-defense. The prosecutor argued that any violation of parole could send defendant back to prison, and if defendant believed his conduct constituted a violation of his parole, then his concern was inconsistent with his testimony that he had done nothing wrong. Defense counsel reiterated his prior objections, noting that a person did not have to commit a crime to be subject to a parole revocation. The trial court granted the prosecutor's request to impeach defendant with evidence of his parole status.

The prosecutor then elicited an admission from defendant that he had been on parole at the time of the charged offenses. Defendant also acknowledged that he could be sent back to prison for failing to maintain contact with his parole officer. Defendant explained that he did not comply with his parole conditions because he was scared. Defendant conceded, however, that he had called his parole officer and stated that he would come to the parole office to explain what had happened, but he never did so.

Over defense objection, the trial court also admitted into evidence the recorded phone message that defendant left for his parole officer. It stated: "Yeah Martinez. This is Young. You didn't have to go to my house and tear it up like that, like a little bitch. That's, that's fucked up. You know, scaring my girl and all that. You know she don't know where I'm at and [inaudible]. I will be in tomorrow at four o'clock with my attorney. That's why I went to talk with an attorney, told them what happened. They investigate. They got more investigation to do. And they, she told me we will march in there tomorrow. And I ain't got to worry, I ain't got to worry about you or nobody else stressing me no more and talking all that nonsense no more. You know. I'll let you know what happened yesterday when the dude got all racial and jumped at me and threw a punch at me. And what am I supposed to do, stand there and take it? You know. I said he threw a punch at me first. And I tried to avoid all confrontation with that guy. You know what I'm saying. But that ain't the point, I

ain't got to explain nothing to you or nobody else. I'm going to talk to my attorney and my attorney going to talk to you tomorrow, and going to be in there. [Inaudible] call you early in the morning and let you know what time I'm coming in. But until then, don't go back out to my house or my apartment [inaudible] like the coward that you are. You know. Confront me, confront me as a man when I come in there. You know because that's all I'm gong to do from now on. I'm going to be real with you. I can't stand you. I don't like you. And I never liked you. I don't respect you as a man. So don't come to my house tearing my house up no more. You know, be a man and do it when I'm there. Don't do it when I ain't there. Scaring my wife. You know she's pregnant there [inaudible]. Who are you[?] You're nobody. You know, I'll be there tomorrow. Not, not because of you, so my name be cleared. Now see you later. Bumpity-bump."

2. Legal Analysis

Defendant argues that his parole status was not relevant, its probative value was outweighed by its prejudicial effect, and its admission violated his federal constitutional right to due process.

"There is little doubt exposing a jury to defendant's prior criminality presents the possibility of prejudicing a defendant's case and rending suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575.) However, a trial court has broad discretion to determine the relevance of any evidence. (§ 350; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) A reviewing court will reverse the trial court's determination as to the admissibility of evidence only where there has been an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Where the trial court has abused its discretion, the defendant must then show a reasonable probability of a more favorable result had the evidence not been admitted. (*People v. Earp* (1999) 20 Cal.4th 826, 877.)

A defendant may also argue that "the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process." (*People v. Partida, supra,* 37 Cal.4th at p. 435.) "But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*Id.* at p. 439, internal citations omitted.)

Here the evidence of defendant's parole status was relevant, because it tended to refute his explanations for leaving the scene, quitting his job, and fleeing, that is, that defendant was not merely scared, but afraid that his conduct at the body shop would result in a violation of his parole and he would be returned to prison. This evidence also tended to show that defendant was lying when he testified that he had acted lawfully in self-defense, because an innocent person would not have acted in the manner that defendant had. As the trial court noted, the evidence of defendant's parole status was not unduly prejudicial, because the jury had already learned of his status as a convicted felon Accordingly, the trial court did not abuse its discretion in admitting evidence of defendant's parole status.

Defendant also challenges the admissibility of the tape-recorded message to his parole officer. We agree with defendant that this evidence did not impeach his prior testimony and was cumulative of other evidence. Prior to the admission of this evidence, defendant had testified that he did not give his parole officer his present location and that he had promised that he and his counsel would meet his parole officer the following day to give his version of the events at the body shop. The evidence was also prejudicial, because defendant insulted the probation officer. Accordingly, we conclude that the trial court abused its discretion in admitting the tape-recorded message.

The error was not prejudicial. The jury had already heard evidence of defendant's parole status, his flight, and his efforts to obtain false identification. His

testimony was uncorroborated in several significant respects. His credibility had been impeached by the admission of five prior convictions. Moreover, his description of the incident was implausible. He claimed that Sereno swung first, but defendant, who was backing away, punched Sereno first and inflicted significant damage to Sereno's mouth and teeth. Thus, it is not reasonably probable that defendant would have obtained a more favorable verdict if the tape-recorded message had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We also conclude that the admission of this evidence did not render the trial fundamentally unfair. (*People v. Partida*, *supra*, 37 Cal.4th p. 439.)

C. CALJIC No. 5.55

Defendant also argues that the trial court violated his right to due process by giving CALJIC No. 5.55, because it was not supported by the evidence and improperly limited his defense.

CALJIC No. 5.55 states: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense."

Relying on *People v. Conkling* (1896) 111 Cal. 616, defendant argues that his conduct did not warrant Sereno taking defensive action against him. In *Conkling*, the victim placed a fence across the road, which the defendant and others used. (*Id.* at p. 619-620.) One day, the defendant was prevented by the deceased from using the road and an argument ensued. (*Id.* at p. 620.) The defendant later tore down the fence and proceeded down the road while carrying a rifle. (*Ibid.*) When the deceased confronted him, the defendant shot and killed him. (*Ibid.*) The trial court instructed the jury, in relevant part: "while it is true that an honest apprehension of danger to life or limb may justify a man for taking the life of another, yet that apprehension must arise out of a reasonable cause; but a cause which originates in the fault of the person himself, in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon

himself by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person." (*Id.* at pp. 624-625.) The Supreme Court held that the jury had been improperly instructed, stating that the jury could have erroneously concluded that the defendant's attempt to travel on the road deprived him of the right of self defense. (*Id.* at pp. 625-626.)

The Supreme Court has subsequently noted that "the . . . self-defense doctrine . . . may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

The instant case is factually similar to the case of *People v. Olguin* (1994) 31 Cal.App.4th 1355. In *Olguin*, the victim began yelling gang slogans at the defendants, who yelled back. (*Id.* at pp. 1366-1367.) One defendant then punched the victim. (*Id.* at p. 1367.) When the victim stood up and began walking towards the defendants, he was shot and killed. (*Ibid.*) The reviewing court held that there was insufficient evidence to support the giving of CALJIC No. 5.55. (*Id.* at p. 1381.) In considering the issue of prejudice, the court observed that the instruction was part of several instructions given on self-defense, and some of the instructions were mutually exclusive. (*Ibid.*) The *Olguin* court concluded: "[i]t was obvious to anyone that not all of those instructions could apply to the case, and the jurors were specifically instructed to 'Disregard any instruction which applies to facts determined by you not to exist.' (CALJIC No. 17.31.) By all appearances, they understood their charge in this regard." (*Ibid.*).

As in *Olguin*, here there was insufficient evidence to support the giving of CALJIC No. 5.55. Under the prosecution theory, Sereno and defendant were arguing. When defendant challenged Sereno to lay hands on him, Sereno walked away. According to the defense, the two men were arguing when Sereno tossed the invoice

on the ground. He then spit on defendant and swung first. Thus, neither the prosecution nor the defense evidence indicated that defendant acted in such a way as to create the necessity of exercising self-defense.

However, there was no prejudice to defendant. Here the trial court gave a series of standard jury instructions on self-defense. The jury was also instructed to disregard instructions which applied to facts they found not to exist. We cannot assume that the jury disregarded that instruction and chose instead to follow an instruction unsupported by the evidence. Moreover, counsel did not refer to this instruction during closing arguments. Thus, we conclude that the giving of this instruction was harmless error.

D. Prior Juvenile Adjudications

Here the information charged defendant with six "strikes" within the meaning of Penal Code sections 667, subdivisions (b)-(i) and 1170.1. Two of the strike allegations were based on prior juvenile adjudications of two counts of forcible oral copulation. After finding that all six of the strike allegations were true, the trial court refused to dismiss any of the strikes.

Defendant argues that the use of his two prior juvenile adjudications as "strikes" under the Three Strikes law deprived him of his rights to due process and a jury trial.

Defendant did not make this argument before the trial court. However, even assuming that defendant's claim has not been waived on appeal, we find that it has no merit. Though defendant acknowledges that this court has rejected his argument in *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 833 and *People v. Lee* (2003) 111 Cal.App.4th 1310, 1316,[7] he relies on the United States Supreme Court

[7] Defendant's argument has also been rejected in *People v. Smith* (2003) 110 Cal.App.4th 1072, 1078-1079, *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394, and *People v. Fowler* (1999) 72 Cal.App.4th 581, 584-587.

decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296, as well as the case of *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194, and the dissent in *Lee*. (*People v. Lee*, *supra*, 111 Cal.App.4th at pp. 1319-1323.) After carefully considering defendant's arguments and the analysis in *Apprendi*, *Blakely*, and *Tighe*, we will continue to follow *Andrades* and *Lee*.

D. Cumulative Error

Defendant argues that even if the errors were not sufficiently prejudicial individually, they were so cumulatively. We disagree. Defendant was entitled to a fair trial, not a perfect one. (*People v. Cain* (1995) 10 Cal.4th 1, 82.) The evidence establishing defendant's guilt of the charged offenses was overwhelming while his defense had significant weaknesses. Thus, the errors were harmless whether considered individually or collectively. Defendant was not denied his right to a fair trial or his right to a reliable verdict. (*People v. Earp*, *supra*, 20 Cal.4th at p. 904; *People v. Partida*, *supra*, 37 Cal.4th at p. 435.)

III. Disposition

The judgment is affirmed.

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Mihara, Acting P.J.

I CONCUR:

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Duffy, J.

McADAMS, J., Dissenting and Concurring.

I respectfully dissent from that portion of the opinion that concludes, in reliance on *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817 and *People v. Lee* (2003) 111 Cal.App.4th 1310, that a prior juvenile adjudication may constitutionally be used as a "strike" despite the fact that there is no right to a jury trial in juvenile proceedings.

As to the threshold question of the lack of objection, I would find that it would have been futile for defendant to object in light of the above cases.

I continue to hold the view that the use of a juvenile adjudication runs counter to *Apprendi v. New Jersey* (2000) 530 U.S. 466, as the Ninth Circuit Court of Appeals found in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187. I further adopt the reasoning set forth in the dissenting opinion of Justice Rushing in *People v. Lee*, *supra*, 111 Cal.App.4th at page 1319. See also the dissenting opinion of Justice Johnson in *People v. Smith* (2003) 110 Cal.App.4th 1072, 1082.

As to the respondent's harmless error argument based on defendant's other convictions, I would remand and defer sentencing to the discretion of the trial court.

That said, I concur in the analysis and disposition of all other issues addressed by the majority.

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McAdams, J.